

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JOAN MARIE ALTEMUS,)	CASE NO. C10-5451-RSL
)	
Plaintiff,)	
)	
v.)	REPORT AND RECOMMENDATION
)	RE: SOCIAL SECURITY DISABILITY
MICHAEL J. ASTRUE, Commissioner)	APPEAL
of Social Security,)	
)	
Defendant.)	
_____)	

Plaintiff Joan Marie Altemus proceeds through counsel in her appeal of a final decision of the Commissioner of the Social Security Administration (Commissioner). The Commissioner denied plaintiff's applications for Disability Insurance Benefits (DIB) after a hearing before an Administrative Law Judge (ALJ). Having considered the ALJ's decision, the administrative record (AR), and all memoranda of record, the Court recommends that this matter be AFFIRMED.

FACTS AND PROCEDURAL HISTORY

Plaintiff was born on XXXX, 1957.¹ She has a high school education and previously

¹ Plaintiff's date of birth is redacted back to the year of birth in accordance with Federal Rule of Civil Procedure 5.2(a) and the General Order of the Court regarding Public Access to Electronic Case Files, pursuant to the official policy on privacy adopted by the Judicial Conference of the United States.

01 worked as a bookkeeper. (AR 19, 25.)

02 Plaintiff filed an application for DIB on August 23, 2006, alleging disability beginning
03 January 26, 2002. She is insured for DIB through December 31, 2004. (AR 12.) Plaintiff's
04 application was denied at the initial level and on reconsideration. Plaintiff timely requested a
05 hearing.

06 On May 8, 2009, ALJ Verrell Dethloff held a hearing, taking testimony from plaintiff.
07 (AR 21-39.) On June 2, 2009, the ALJ issued a decision finding plaintiff not disabled. (AR
08 12-20.)

09 Plaintiff timely appealed. The Appeals Council granted the request for review on
10 February 26, 2010. (AR 79-82.) On April 26, 2010, the Appeals Council found plaintiff not
11 entitled to disability benefits. (AR 4-6.) Plaintiff appealed this final decision of the
12 Commissioner to this Court.

13 **JURISDICTION**

14 The Court has jurisdiction to review the ALJ's decision pursuant to 42 U.S.C. § 405(g).

15 **DISCUSSION**

16 The Commissioner follows a five-step sequential evaluation process for determining
17 whether a claimant is disabled. *See* 20 C.F.R. §§ 404.1520, 416.920 (2000). At step one, it
18 must be determined whether the claimant is gainfully employed. The ALJ found plaintiff had
19 not engaged in substantial gainful activity since the alleged onset date. At step two, it must be
20 determined whether a claimant suffers from a severe impairment. The ALJ found plaintiff's
21 fibromyalgia, lumbar degenerative disc disease, right rotator cuff tear with impingement
22 syndrome, plantar fasciitis, and obesity severe. Step three asks whether a claimant's

01 impairments meet or equal a listed impairment. The ALJ found that plaintiff's impairments
02 did not meet or equal the criteria of a listed impairment. If a claimant's impairments do not
03 meet or equal a listing, the Commissioner must assess residual functional capacity (RFC) and
04 determine at step four whether the claimant has demonstrated an inability to perform past
05 relevant work. The ALJ found plaintiff able to perform the full range of sedentary work, being
06 able to stand and/or walk for two hours in an eight hour workday and sit for about six hours in
07 an eight hour workday. With that assessment, the ALJ found plaintiff able to perform her past
08 relevant work as a bookkeeper and, therefore, not disabled.

09 On review, the Appeals Council upheld the ALJ's findings under steps one, two and
10 three, but did not agree with the ALJ's step four assessment that plaintiff could perform her past
11 relevant work as a bookkeeper as actually performed. The Appeals Council proceeded to step
12 five and, using the Medical-Vocational Guidelines (the "Guidelines" or "Grids") as a
13 framework, found plaintiff able to perform a significant number of jobs in the national economy
14 considering her RFC, age, education, and work experience. (AR 5.) The Appeals Council,
15 therefore, found plaintiff not entitled to DIB. (AR 6.)

16 This Court's review of the ALJ's decision is limited to whether the decision is in
17 accordance with the law and the findings supported by substantial evidence in the record as a
18 whole. *See Penny v. Sullivan*, 2 F.3d 953, 956 (9th Cir. 1993). Substantial evidence means
19 more than a scintilla, but less than a preponderance; it means such relevant evidence as a
20 reasonable mind might accept as adequate to support a conclusion. *Magallanes v. Bowen*, 881
21 F.2d 747, 750 (9th Cir. 1989). If there is more than one rational interpretation, one of which
22 supports the ALJ's decision, the Court must uphold that decision. *Thomas v. Barnhart*, 278

01 F.3d 947, 954 (9th Cir. 2002).

02 Plaintiff argues that the ALJ erred by not finding her depression severe at step two of the
03 sequential evaluation. She contends her mental impairment caused significant non-exertional
04 limitations, making reliance on the Guidelines inappropriate. Plaintiff requests an award of
05 benefits. The Commissioner argues that the ALJ's determination that plaintiff's depression
06 was not severe was supported by substantial evidence. Therefore, the Commissioner argues,
07 the Guidelines were appropriately used as a framework to determine that plaintiff was not
08 disabled and the decision should be affirmed.

09 Step Two

10 At step two, a claimant must make a threshold showing that her medically determinable
11 impairments significantly limit her ability to perform basic work activities. *See Bowen v.*
12 *Yuckert*, 482 U.S. 137, 145 (1987) and 20 C.F.R. §§ 404.1520(c), 416.920(c). "Basic work
13 activities" refers to "the abilities and aptitudes necessary to do most jobs." 20 C.F.R. §
14 404.1521(b). "An impairment or combination of impairments can be found 'not severe' only
15 if the evidence establishes a slight abnormality that has 'no more than a minimal effect on an
16 individual's ability to work.'" *Smolen v. Chater*, 80 F.3d 1273, 1290 (9th Cir. 1996) (quoting
17 Social Security Ruling (SSR) 85-28). "[T]he step two inquiry is a de minimis screening device
18 to dispose of groundless claims." *Id.* (citing *Bowen*, 482 U.S. at 153-54).

19 The ALJ considered plaintiff's depression at step two, but concluded it was not a severe
20 impairment.

21 Moreover, the [plaintiff] was assessed with depression. It appears that
22 she was prescribed medication but the medical records do not provide very
much information regarding her symptoms. The [plaintiff] alleged mental

01 limitations such as memory problems. She also reported that she had become
02 more socially isolated. These reports are however not supported by the
03 objective medical evidence during the time period at issue. Moreover, during
04 the period in question, it does not appear that the [plaintiff] sought counseling or
05 treatment from a psychiatrist. Failure to seek appropriate treatment may
06 provide a basis to deny benefits where [plaintiff] has not sought amelioration of
07 mental impairments, and reflects on the credibility of allegations that such an
08 impairment is disabling. A state agency medical consultant, Arthur Hamlin,
09 PsyD, reviewed the [plaintiff's] records on November 8, 2006. It was
10 determined that there was insufficient evidence to determine the [plaintiff's]
11 functioning at the time of her date last insured. These findings were affirmed
12 by another state agency medical consultant, James Levasseur, PhD, on February
13 13, 2007. I give significant weight to these findings as they are consistent with
14 the minimal records available.

09 The [plaintiff] has failed to carry her burden of establishing a medically
10 determinable mental impairment prior to her date last insured. Where she has
11 failed to establish a record adequate to establish a residual functional capacity
12 prior to the date last insured, the conclusion must be reached that she had no
13 severe impairment prior to that date.

12 (AR 16-17, citations omitted.)

13 Plaintiff argues that the ALJ's reasons are not supported by substantial evidence. She
14 urges the conclusion that a judgment about limitations on work activities could be made from
15 statements in the record about symptoms such as insomnia, concentration, anxiety, irritability,
16 and anhedonia, all of which constitute workplace limitations. Plaintiff further contends that
17 the continuation of her depression symptoms past the date last insured may appropriately be
18 considered to establish the required twelve month durational period. Plaintiff disputes the
19 significance of a lack of treatment by a psychiatrist, noting there is no requirement that a
20 claimant treat with a specialist. Plaintiff also questions the conclusion of the state agency
21 physicians that there was insufficient evidence of functional limitations before the date last
22 insured, since the record does not show the evidence they reviewed.

01 In response, the Commissioner argues that the only evidence of depression during the
02 relevant period is plaintiff's allegations on two occasions that she was depressed, one of which
03 pre-dates the relevant time period. He contends the ALJ appropriately noted plaintiff's lack of
04 follow-through with the recommendation that she seek mental health counseling, concluding
05 the alleged impairment was not all that limiting. 20 C.F.R. § 404.1529(c)(3) ("The
06 information that you, your treating or nontreating source, or other persons provide about your
07 pain or other symptoms (e.g., ... what medications, treatments or other methods you use to
08 alleviate them...) is also an important indicator of the intensity and persistence of your
09 symptoms.") The Commissioner further argues that the record does not show the condition
10 lasted for, or was expected to last for, "a continuous period of at least twelve months" as
11 required by the regulations. 20 C.F.R. § 404.1509. He avers that, at the most, the occasions
12 after the relevant period showed symptoms that were recent, situational, and very mild, and
13 symptoms alone are insufficient to establish a medically determinable impairment. The
14 Commissioner notes that plaintiff bears the burden of establishing a severe impairment by
15 providing medical evidence of an impairment and identifying any functional limitations
16 resulting therefrom. He notes the lack of any mention of depression at the administrative
17 hearing before the ALJ (AR 21-39), or in plaintiff's brief to the Appeals Council (AR 7-8,
18 141-42). Because the ALJ is responsible for judging the medical evidence, the Commissioner
19 urges that this Court not re-weigh the evidence, nor substitute its judgment for that of the
20 Commissioner, if there is more than a scintilla of evidence to support the ALJ's interpretation
21 of the medical evidence, and if that interpretation is based on correct legal standards.

22 The Court agrees that plaintiff does not succeed in establishing error in the ALJ's

01 consideration of her mental impairments. The Commissioner correctly observes that plaintiff
02 bears the burden of establishing she has an impairment and its severity during the time she says
03 she is disabled. 20 C.F.R. § 404.1512(c). *See also Miller v. Heckler*, 770 F.2d 845, 849 (9th
04 Cir. 1985) (finding claim properly rejected when claimant failed to produce any clinical
05 evidence showing his use of prescription narcotics impaired his ability to work). The ALJ here
06 reasonably concluded plaintiff had not met that burden.

07 Having been previously found not disabled through January 25, 2002 (AR 12), plaintiff
08 must establish a severe impairment after that date, but before December 24, 2004, the date her
09 DIB insured status expired. Plaintiff cites a chart note from Dr. Spuza-Milford, a
10 rheumatologist, with the notation “Zoloft depressed pt” (AR 384), but the Commissioner
11 correctly points out that the June 15, 2001 chart note pre-dates the relevant time period. The
12 ALJ did acknowledge that plaintiff had been assessed with depression on two occasions –
13 September 16, 2004 (AR 163) and December 3, 2004 (AR 374). In considering those
14 assessments, the ALJ found that “she was prescribed medication but the medical records do not
15 provide very much information regarding her symptoms.” (AR 16.) Although plaintiff
16 endorsed the symptom of sleep disturbance, Dr. Spuza-Milford did not specifically connect that
17 symptom to plaintiff’s depression, or opine any functional limitations as a result of her
18 depression. In fact, the doctor listed “Insomnia” as a separate diagnosis. (AR 163.) While
19 plaintiff mentioned memory problems and social isolation in her 2006 application for disability
20 benefits (AR 100-09, 115-21), the ALJ appropriately noted that “these reports are however not
21 supported by the objective medical evidence during the time period at issue” (AR 16), as the
22 contemporaneous medical records in 2004 contain virtually no mention of these problems to

01 her doctors (*see, e.g.*, AR 163-66).

02 Plaintiff also cites references to depression in the medical records that post-date the date
03 last insured of December 31, 2004. She acknowledges this evidence cannot establish a
04 medically determinable impairment retroactively, but argues the evidence may be used to
05 satisfy the twelve month durational requirement for symptoms and impairments arising before
06 the date last insured. However, the Court agrees with the Commissioner that the evidence does
07 not establish an impairment that has lasted or is expected to last “for a continuous period of at
08 least 12 months”. 20 C.F.R. § 404.1509. As discussed previously, substantial evidence
09 supports the ALJ’s finding that plaintiff’s depression was not a severe impairment previous to
10 the date last insured, and, at most, the records after the date last insured show depressive
11 symptoms that were situational, of recent onset, or mild. (AR 160 (“Reactive Depression”),
12 AR 215 (“Recent depression”), AR 176 (“Psychological symptoms: No anxiety and no
13 depression”), AR 394 (“Depression in the past two weeks[.]”)

14 Nor does the record reflect that plaintiff followed up on the recommendation she “seek
15 counseling through mental health” (AR 374), which was appropriate for the ALJ to consider in
16 evaluating the credibility of plaintiff’s allegations that she was disabled by her mental
17 impairment. (AR 16.) Information about treatment is “an important indicator of the intensity
18 and persistence of [a claimant’s] symptoms.” 20 C.F.R. § 404.1529(c)(3).

19 Finding that plaintiff failed to carry her burden of establishing a medically determinable
20 mental impairment prior to her date last insured, the ALJ cited the opinions of two state agency
21 medical consultants, Arthur Hamlin, Psy.D. (AR 220-33) and James Levasseur, Ph.D. (AR
22 263-76). Plaintiff argues the ALJ should not have relied on these reports because the

01 consultants did not discuss the evidence they reviewed. Plaintiff's point is well-taken with
02 regard to Dr. Hamlin, who did not specify the evidence relied upon in support of his conclusion
03 that "Review of medical evidence finds insufficient evidence to determine clmt's functioning at
04 time of [Date Last Insured]." (AR 232.) However, Dr. Levasseur indicated he reviewed
05 "current 2006 treatment records", which, although reporting a diagnosis of depression, "also
06 show no psychological symptoms of anxiety or depression[.]" and stated: "Additionally, a
07 review of the available MER prior to DLI does not indicate treatment for any type of mental
08 impairment. Therefore, the claim is deemed insufficient." (AR 275.) Plaintiff does not
09 succeed in showing error in the ALJ's consideration of the opinions of these two consulting
10 experts.

11 Step Five

12 The Appeals Council modified the finding of the ALJ at step four of the sequential
13 evaluation, and found plaintiff not able to perform the duties of her past relevant work as a
14 bookkeeper as actually performed. The Appeals Council proceeded to step five, using the
15 Guidelines, Rule 201.21, Table No. 1 of 20 C.F.R. Pt. 404, Subpt. P, App. 2, as a framework for
16 decision making. (AR 5.) Given plaintiff's age (at 47, a "younger individual" as defined in
17 the Guidelines), high school education, past relevant work of a semiskilled or skilled nature,
18 and the ability to perform at the sedentary exertional level, the Guidelines directed a finding of
19 "not disabled".

20 Plaintiff argues her depression constitutes a significant non-exertional mental
21 impairment, precluding the use of the Guidelines. *Tackett v. Apfel*, 180 F.3d 1094, 1101-1102
22 (9th Cir. 1999) (holding that "significant non-exertional impairments" may make reliance on

01 the grids inappropriate). However, as no error has been shown in the ALJ's finding that
02 plaintiff did not have a severe mental impairment, this assignment of error necessarily fails.

03 **CONCLUSION**

04 For the reasons set forth above, the Commissioner's decision should be AFFIRMED.

05 DATED this 23rd day of February, 2011.

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08 Mary Alice Theiler
09 United States Magistrate Judge
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